

## Department of Energy

## § 609.12

contract (under 48 CFR part 9.4) or participation in a non-procurement activity (under a set of uniform regulations implemented for numerous agencies, such as DOE, at 2 CFR part 180);

(2) Not be delinquent on any Federal debt or loan;

(3) Be legally authorized to enter into loan guarantee transactions authorized by the Act and these regulations and is in good standing with DOE and other Federal agency loan guarantee programs;

(4) Be able to demonstrate, or has access to, experience in originating and servicing loans for commercial projects similar in size and scope to the project under consideration; and

(5) Be able to demonstrate experience or capability as the lead lender or underwriter by presenting evidence of its participation in large commercial projects or energy-related projects or other relevant experience; or

(6) Be the Federal Financing Bank.

(b) When performing its duties to review and evaluate a proposed Eligible Project prior to the submission of a Pre-Application or Application, as appropriate, by the Project Sponsor through the execution of a Loan Guarantee Agreement, the Eligible Lender or DOE if loans are funded by the Federal Financing Bank, shall exercise the level of care and diligence that a reasonable and prudent lender would exercise when reviewing, evaluating and disbursing a loan made by it without a Federal guarantee.

(c) The servicing duties shall be performed by the Eligible Lender, DOE or other servicer if approved by the Secretary. When performing the servicing duties the Eligible Lender, DOE or other servicer shall exercise the level of care and diligence that a reasonable and prudent lender would exercise when servicing a loan made without a Federal guarantee, including:

(1) During the construction period, enforcing all of the conditions precedent to all loan disbursements, as provided in the Loan Guarantee Agreement, Loan Agreement and related documents;

(2) During the operational phase, monitoring and servicing the Debt Obligations and collection of the outstanding principal and accrued interest

as well as ensuring that the collateral package securing the Guaranteed Obligations remains uncompromised; and

(3) As specified by DOE, providing annual or more frequent financial and other reports on the status and condition of the Guaranteed Obligations and the Eligible Project, and promptly notifying DOE if it becomes aware of any problems or irregularities concerning the Eligible Project or the ability of the Borrower to make payment on the Guaranteed Obligations or other debt obligations.

(d) With regard to partial guarantees, even though DOE may in part rely on the Eligible Lender or other servicer to service and monitor the Guaranteed Obligation, DOE will also conduct its own independent monitoring and review of the Eligible Project.

### § 609.12 Project Costs.

(a) Before entering into a Loan Guarantee Agreement, DOE shall determine the estimated Project Costs for the project that is the subject of the agreement. To assist the Department in making that determination, the Applicant must estimate, calculate and record all such costs incurred in the design, engineering, financing, construction, startup, commissioning and shakedown of the project in accordance with generally accepted accounting principles and practices. Among other things, the Applicant must calculate the sum of necessary, reasonable and customary costs that it has paid and expects to pay, which are directly related to the project, including costs for escalation and contingencies, to estimate the total Project Costs.

(b) Project Costs include:

(1) Costs of acquisition, lease, or rental of real property, including engineering fees, surveys, title insurance, recording fees, and legal fees incurred in connection with land acquisition, lease or rental, site improvements, site restoration, access roads, and fencing;

(2) Costs of engineering, architectural, legal and bond fees, and insurance paid in connection with construction of the facility; and materials, labor, services, travel and transportation for facility design, construction, startup, commissioning and shakedown;

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- (3) Costs of equipment purchases;
  - (4) Costs to provide equipment, facilities, and services related to safety and environmental protection;
  - (5) Financial and legal services costs, including other professional services and fees necessary to obtain required licenses and permits and to prepare environmental reports and data;
  - (6) The cost of issuing project debt, such as fees, transaction and legal costs and other normal charges imposed by Eligible Lenders and other Holders;
  - (7) Costs of necessary and appropriate insurance and bonds of all types;
  - (8) Costs of design, engineering, startup, commissioning and shakedown;
  - (9) Costs of obtaining licenses to intellectual property necessary to design, construct, and operate the project;
  - (10) A reasonable contingency reserve for cost overruns during construction; and
  - (11) Capitalized interest necessary to meet market requirements, reasonably required reserve funds and other carrying costs during construction; and
  - (12) Other necessary and reasonable costs.
- (c) Project Costs do not include:
- (1) Fees and commissions charged to Borrower, including finder's fees, for obtaining Federal or other funds;
  - (2) Parent corporation or other affiliated entity's general and administrative expenses, and non-project related parent corporation or affiliated entity assessments, including organizational expenses;
  - (3) Goodwill, franchise, trade, or brand name costs;
  - (4) Dividends and profit sharing to stockholders, employees, and officers;
  - (5) Research, development, and demonstration costs of readying the innovative energy or environmental technology for employment in a commercial project;
  - (6) Costs that are excessive or are not directly required to carry out the project, as determined by DOE, including but not limited to the cost of hedging instruments;
  - (7) Expenses incurred after startup, commissioning, and shakedown before the facility has been placed in service;

- (8) Borrower-paid Credit Subsidy Costs and Administrative Costs of Issuing a Loan Guarantee; and
- (9) Operating costs.

### § 609.13 Principal and interest assistance contract.

With respect to the guaranteed portion of any Guaranteed Obligation, and subject to the availability of appropriations, DOE may enter into a contract to pay Holders, for and on behalf of Borrower, from funds appropriated for that purpose, the principal and interest charges that become due and payable on the unpaid balance of the guaranteed portion of the Guaranteed Obligation, if DOE finds that:

- (a) The Borrower:
  - (1) Is unable to make the payments and is not in default; and
  - (2) Will, and is financially able to, continue to make the scheduled payments on the remaining portion of the principal and interest due under the non-guaranteed portion of the debt obligation, if any, and other debt obligations of the project, or an agreement, approved by DOE, has otherwise been reached in order to avoid a payment default on non-guaranteed debt.
- (b) It is in the public interest to permit Borrower to continue to pursue the purposes of the project;
- (c) In paying the principal and interest, the Federal government expects a probable net benefit to the Government will be greater than that which would result in the event of a default;
- (d) The payment authorized is no greater than the amount of principal and interest that Borrower is obligated to pay under the terms of the Loan Guarantee Agreement; and
- (e) Borrower agrees to reimburse DOE for the payment (including interest) on terms and conditions that are satisfactory to DOE and executes all written contracts required by DOE for such purpose.

### § 609.14 Full faith and credit and incontestability.

The full faith and credit of the United States is pledged to the payment of all Guaranteed Obligations issued in accordance with this part with respect to principal and interest.